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No. 90-1921

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHAD SEXTON, an Unmarried Infant, by and through his Mother and Natural Guardian, **MARY SEXTON**, - - - **Petitioner**,

versus

BELL HELMETS INC., A California Corporation, - - - - - - - **Respondent.**

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DESIGNATION OF CORPORATE RELATIONSHIP

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Bell Helmets Inc., a California corporation, states:

1. Bell Helmets Inc., a California corporation, has changed its name to Bell Sports Inc., a California corporation. Bell Sports Inc., is a wholly owned subsidiary of Bell Sports Holding Corp. Bell Sports Inc. has no ownership interest in any subsidiary companies.

2. Bell Sports Holding Corp. has no ownership interest in any subsidiary companies except for wholly owned subsidiaries.

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Respondent is satisfied with petitioner's description of the opinion below and the jurisdiction of this Court. There is a misstatement on p. 2 of the Petition regarding the basis for federal jurisdiction in the court of first instance. The basis for jurisdiction in the district court was 28 U.S.C. § 1332(a)(1), not 42 U.S.C. § 1983 as stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent maintains that the issue presented herein has been mischaracterized as a due process issue. The

real issue is whether the court of appeals in a diversity action pursuant to *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), properly applied substantive state law principles in a products liability case and directed entry of judgment in accordance with such principles.

STATEMENT OF THE CASE

This is a products liability case involving principles of application of state law in a diversity case.

On December 27, 1984, Chad Sexton, the petitioner herein, then 13 years old, was involved in a motorcycle accident with his friend and cousin, Jackie Boggs. Sexton and Boggs collided while operating their respective motorcycles in opposite directions on a public road near Dobbins, Kentucky. Each motorcycle was travelling about 35 to 40 miles per hour at impact and petitioner was thrown from his motorcycle and propelled 183 feet from the point of impact. Petitioner sustained serious injuries, including brain damage, as a result of the accident.

At the time of the collision, petitioner was wearing a Bell Star III helmet designed and manufactured by respondent. The helmet remained on petitioner's head throughout the accident.

Petitioner brought an action against respondent claiming the helmet failed to prevent the head injury and the case proceeded to jury verdict in the district court[1] on strict liability theories of design defect and inadequate warning. After a verdict in the amount of $1,551,381 for

[1]The case was tried in the United States District Court for the Southern District of West Virginia, at Huntington, and bore Civil Action No. 3:88-0989 therein. The district court determined that Kentucky substantive law applied. Neither party contested this determination on appeal.

petitioner, the district court denied respondent's motions for judgment notwithstanding the verdict and for a new trial, and respondent appealed to the United States Court of Appeals for the Fourth Circuit.

In the court of appeals,[2] respondent challenged the trial court's charge and ruling on the issue of contributory negligence. Additionally, respondent contended that the trial court improperly refused to strike certain expert testimony and grant respondent's motion for a directed verdict and subsequent motion for judgment notwithstanding the verdict.

The court of appeals vacated the judgment order of the district court and found that the district court should have directed a verdict for respondent on the issue of design defect because the evidence of plaintiff's expert on this issue failed to establish a design defect and should have been stricken. Additionally, the court of appeals remanded the case to the district court for a new trial on the remaining issue of warning defect. The court of appeals ruled against respondent on the issues of the charge and contributory negligence.

The court of appeals made a detailed analysis of the testimony offered by petitioner and his expert on the issue of design defect and found from the record the following:

1. The helmet's design met or exceeded all government and industry standards in existence at the time the helmet was originally designed and manufactured, and there were no other applicable helmet standards;

[2]As used herein the term "court of appeals" refers to the United States Court of Appeals for the Fourth Circuit. The decision from which review is sought is published at 926 F.2d 331 (4th Cir. 1991).

2. There was no manufacturing defect in the helmet;
3. No one in the helmet industry designed a helmet in the manner suggested by petitioner's design expert;
4. There was no evidence that purchasers of helmets expected a higher level of protection than called for by the applicable government and industry standards;
5. There was no evidence that purchasers of helmets expected a higher level of protection in helmets worn by children than in helmets worn by adults;
6. There was no evidence which suggested that the design choice to focus on high speed impacts created an unacceptable risk for low speed impacts; and,
7. Petitioner's design defect expert presented evidence which amounted to nothing more than a theoretically probable design alternative which "could" have protected against the injury complained of.

Finding this evidence incapable of sustaining petitioner's burden of proof, the court of appeals held that the district court should have granted respondent's motion for a directed verdict and remanded the case to the district court with instructions to vacate the judgment, enter judgment for respondent on the issue of design defect and conduct a new trial on the remaining issue of warning defect.

SUMMARY OF ARGUMENT

Petitioner fails to present any special and important reasons why this Court should grant the Petition. The court of appeals, in a procedurally constitutional manner, correctly directed entry of judgment for respondent without a new trial on the issue of design defect. Furthermore, the court of appeals correctly applied the substantive products liability law of Kentucky to the facts of this case.

ARGUMENT

I. The Petitioner Has Been Accorded Full Due Process

The petition herein is devoid of any mention of Rule 10.1 of this Court's rules which provides that a petition will be granted "only when there are special and important reasons therefor", including but not limited to, certain well established reasons such as a conflict between courts of appeals on the same issue or conflict between courts on decisions relating to federal questions. Instead of focusing on Rule 10.1 to explain why certiorari should be granted, petitioner screams foul based upon broad and general claims that he was somehow denied due process, an issue raised for the first time in one paragraph of his Petition for Rehearing and Suggestion for Rehearing In Banc filed in the court of appeals.[3]

The petition sheds no light on why an appellate court's reversal of a district court's ruling on a directed verdict motion constitutes a denial of due process. The cases cited by petitioner do not remotely suggest that this practice is prohibited by the Fourteenth Amendment. It cannot be controverted that federal courts of appeals deal with contested directed verdict motions and motions for judgment notwithstanding the verdict routinely or that rulings on these issues do not rise to the level of constitutional magnitude.

This Court has specifically addressed the issue of whether a federal appeals court, in a case not procedurally dissimilar from the instant action, may order entry of judgment in favor of a party whose motion for judgment

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[3]This paragraph is located at p. 32a of the Petition herein. The entire Petition for Rehearing and Suggestion for Rehearing In Banc is set forth at pp. 21a-34a of the Petition.

notwithstanding the verdict was incorrectly denied by a trial court. In *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), this Court found no constitutional or statutory bar to an appellate court itself directing entry of judgment on appeal. This Court held that there were sufficient procedural safeguards for a plaintiff-appellee, who received a fair trial and lost a verdict on appeal, to request a new trial instead of a directed verdict. *Id.* at 329.

In this case, petitioner made his request for a new trial instead of a directed verdict[4] to the court of appeals in his Petition for Rehearing and Suggestion for Rehearing In Banc. This request was denied. Such procedure is constitutionally permissible and petitioner offers no reasons why this court should revisit *Neely* and examine this issue.

Respondent does not deny that petitioner is entitled to due process and fundamental fairness. However, the four cases cited by petitioner do not in any way support the proposition that petitioner was denied due process in the court of appeals.

In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that a state's own failure to conduct a hearing within the time prescribed by a fair employment practice act, which caused a claimant to lose rights guaranteed by such act, violated the due process clause of the Fourteenth Amendment. In *Lassiter* v. *Dep't of Soc. Services*, 452 U.S. 18 (1981), this Court held that the refusal to appoint counsel for an indigent parent in a parental termination hearing did not violate the due process clause of the Fourteenth Amendment. *Matthews* v. *Eld-*

[4]Petitioner was entitled to maintain that only a new trial would be proper in the court of appeals pursuant to Rule 50(d) of the Federal Rules of Civil Procedure. Petitioner failed to advance this position in his main Brief in that court.

ridge, 424 U.S. 319 (1976), stands for the proposition that an evidentiary hearing is not constitutionally required prior to an initial termination of Social Security disability benefits. Finally, petitioner cites this court to the concurring opinion in *Louisiana ex rel. Folsom Bros.* v. *Mayor of New Orleans,* 109 U.S. 285 (1883), which stands for the proposition that civil judgments are property rights protected by the Fourteenth Amendment.

From the wide and varied holdings described above, none of which are remotely on point, petitioner argues he was denied due process by the court of appeals. This argument is totally without merit and presents nothing more than a last gasp effort to preserve the judgment obtained in the trial court which the court of appeals, in a manner procedurally approved by this Court, directed should have been entered for respondent.

II. The Court of Appeals Correctly Interpreted and Applied Kentucky Products Liability Law.

The gravamen of petitioner's argument is that the court of appeals failed to follow the mandate of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), and created new Kentucky law which contradicts prevailing state products liability law.

It is conceded that the post *Erie* trilogy of cases cited by petitioner stands for the proposition that it is the duty of federal courts to ascertain and apply state substantive law where state law supplies the rule of decision even though the interpretation of state law relied upon may not be of the highest state court. *West* v. *Am. Tel. & Tel. Co.,* 311 U.S. 223 (1940); *Six Companies* v. *Joint Highway Dist.,* 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins.,* 311 U.S. 464 (1940).

Respondent disputes petitioner's assertion that the court of appeals created new law in its decision contested here. Rather, respondent maintains that the court of appeals applied well established principles of Kentucky law to the facts presented.

The thrust of petitioner's position is that the court of appeals fashioned new Kentucky products liability law when it found that upon the facts presented in this case, in order to establish a design defect, one must show a deviation from an existing standard or from a reasonable consumer expectation at the time of the initial sale. This is not new Kentucky law nor does it conflict with any Kentucky statute.

In 1966, Kentucky's highest court[5] adopted the doctrine of strict liability in tort. *Dealers Transport Co.* v. *Battery Distrib. Co.*, 441 S.W. 2d 411 (Ky. 1966). In its simplest terms the concept of strict liability imposes liability upon those who manufacture a product in a "defective condition unreasonably dangerous to the user." *Restatement (Second) of Torts* § 402A. *See also, Ulrich* v. *Kasco Abrasives Co.*, 532 S.W. 2d 197 (Ky. 1976). Since adoption of strict liability, Kentucky courts have generally followed the principles set forth in *Restatement (Second) of Torts* § 402A as a guideline for interpretation. *Anderson* v. *Black & Decker* (U.S., Inc., 597 F. Supp. 1298, 1300 (E.D. Ky. 1984).

In one of the earliest decisions interpreting the newly established doctrine of strict liability, *Jones* v. *Hutchinson Mfg., Inc.*, 502 S.W.2d 66 (Ky. 1973), Kentucky's highest

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[5]Until January 1, 1976, the highest court in Kentucky was the Court of Appeals. After that date, Kentucky established a two tier appellate process with an intermediate appellate court, called the Court of Appeals and with a highest court called the Supreme Court. Ky. Const. § 109.

court established several principles applicable in design defect cases such as the one at bar:

1. The manufacturer of a product is not required to make the best possible product or a better product than the one at issue so long as the product is reasonably safe.
2. The manufacturer of a product is not an insurer of the safety of his product.
3. In the absence of evidence that an industry has carelessly established a standard, a design conforming to an established standard will be deemed to be reasonably safe.
4. An injured person cannot prove a defect by presenting an expert who offers a *post hoc* conclusion that it was theoretically probable that a different design would be feasible and would have prevented the injury complained of.

As part of the evolving doctrine of strict liability, Kentucky courts proceeded to attempt to define the term "defect". *Nichols* v. *Union Underwear Co.*, 602 S.W. 2d 429 (Ky. 1980). In *Nichols,* Kentucky's highest court noted that many factors may be considered in determining whether a product is defective. *Id.* These factors include consumer knowledge or consumer expectation, deviation from industry standards, and obviousness of danger when coupled with presence of a warning. *Id.* at 433. Most importantly, the Nichols court concluded by holding that "the facts of the individual case will determine what is relevant to each action." *Id.*

In short, *Nichols* confirms the proposition that defectiveness for strict liability purposes is a fluid concept dependent upon the circumstances presented in each case. While the *Nichols* court did reject the so-called consumer

expectations test based upon the facts presented therein as an absolute defense, such an inquiry is recognized as one of the factors which should be considered in determining whether a product is defective. *Id.* at 432-33.

In *Montgomery Elevator Co.* v. *McCullough,* 676 S.W. 2d 776 (Ky. 1984), Kentucky's highest court once again addressed the concept of defect in a strict liability case. The court expressly followed the decision in *Nichols* and stated that many considerations must be weighed in arriving at the conclusion that a product is defective. *Id.* at 780-81. However, the court in *Montgomery Elevator* went on to hold that in a particular case the considerations present "may be decisive" and explained that Kentucky courts, because of the particular circumstances present, can properly conclude as a *matter of law* that the facts did not establish an actionable defect. *Id.* at 781.

Finally, in *Ingersoll-Rand Co.* v. *Rice,* 775 S.W. 2d 924 (Ky. Ct. App. 1989), the intermediate court of appeals in Kentucky reaffirmed the proposition that something more than a *post hoc* conclusion from an expert is necessary to prove a defect and found that, upon remand, unless something more was offered to prove defect, compliance with industry standards would be a sufficient ground for a directed verdict. *Id.* at 928-29.

From the above it is patently clear that Kentucky courts have established the rule in a design defect case that many considerations may be weighed in determining whether a product is defective, but that, after such review, a court may hold as a matter of law that no actionable defect existed.

Petitioner now urges that the court of appeals fashioned new Kentucky law in finding in this case that "a product can only be defective if it is imperfect when measured

against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale." *Sexton* v. *Bell Helmets Inc.*, 926 F.2d 331, 337 (4th Cir. 1991). Petitioner argues that such a rule directly contravenes Kentucky decisions which hold that defectiveness is "a question of fact involving many considerations." [Pet. at p. 7]. Petitioner is clearly wrong for a number of reasons. First, the cases cited by petitioner, as previously explained, specifically recognize that compliance with industry standards is a defense to a products liability claim and that in certain cases, where the standards themselves are not challenged, may be issue dispositive. Second, Kentucky does recognize that consumer expectations are relevant in determining defectiveness of a product. Third, the court of appeals made an extensive review of the record and made the factual inquiry not only recognized and approved but demanded by Kentucky courts. Finally, Kentucky courts have recognized that while many factors go into the determination of design defect, courts may still, after a consideration of the facts of a given case, find one such factor issue dispositive.

Petitioner claims added support for his position by reference to the Kentucky Product Liability Act, Ky. Rev. Stat. Ann. §§ 411.300-.350 (Michie/Bobbs-Merrill 1990) [hereinafter "The Act"],[6] and the decision of *Ingersoll-Rand Co.* v. *Rice*, 775 S.W. 2d 924 (Ky. Ct. App. 1989).

Ky. Rev. Stat. Ann. § 411.310(2), the provision of The Act relied upon by petitioner, provides:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the

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[6]The Act is set forth in full at pp. 37a-39a of the Petition herein.

> design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

Interpretation of this provision has been hotly contested throughout this case. *Sexton* v. *Bell Helmets Inc.*, 926 F.2d 331, 332-34 (4th Cir. 1991). However, the plain words of the statute recognize compliance with industry standards as a defense as has every Kentucky court which has addressed the issue. While no Kentucky court has squarely confronted the meaning of the above quoted provision of The Act,[7] it is preposterous to urge that it eliminates compliance with industry standards as a factor to be considered in determining whether a product is defective. No court has so held and The Act does not so provide. Finally, petitioner fails to point out that the purpose of The Act was to restrict and limit the right to recover in products liability actions. *In re Beverly Hills Fire Litigation*, 695 F. 2d 207, 225 n.38 (6th Cir. 1982); *Reda Pump Co.* v. *Finch*, 713 S.W.2d 818, 820 (Ky. 1986).

Petitioner seeks support for his position that the court of appeals made new Kentucky products liability law from the decision in *Ingersoll-Rand Co.* v. *Rice*, 775 S.W.2d 924 (Ky. Ct. App. 1989). A careful review of the *Ingersoll-Rand* decision leads to the inescapable conclusion that Petitioner is wrong. In *Ingersoll-Rand*, the court, after careful review of the record, found that plaintiff's expert on the

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[7]The court of appeals expressed "puzzlement" over the need for the statute as drafted. 926 F.2d 331, 333. While not squarely addressing the meaning of the provision of The Act in question, two courts have questioned the need for the statute. *Ingersoll-Rand* v. *Rice*, 775 S.W.2d 924, 928 (Ky. Ct. App. 1989); *Anderson* v. *Black and Decker (U.S.), Inc.*, 507 F. Supp. 1298, 1301, n.3 (E.D. Ky. 1984).

issue of design defect presented evidence, which amounted to nothing more than a conclusion, that it was theoretically probable that a different design could have prevented injuries. *Id.* at 928-29. The court found that such evidence, upon remand, would be insufficient to allow the case to go to a jury. The *Ingersoll-Rand* court noted that evidence of a theoretically probable design alternative did not rebut the presumption set forth in The Act, which provides a defense to manufacturers if the design of the product in question is in compliance with industry standards. *Id.*

From the above analysis it is clear that Petitioner's argument that the court of appeals incorrectly applied The Act and Kentucky decisions law, is without merit.

As a final point, petitioner makes a fleeting attempt to create a conflict between two circuits on the issue of design defectiveness where none exists. Petitioner argues that *Leonard* v. *Uniroyal, Inc.*, 765 F.2d 560 (6th Cir. 1985), interpreting Kentucky law, holds that the issue of design defectiveness requires investigation of many considerations.[8] Respondent has already analyzed the precise decisions of Kentucky cases in this area and reiterates that the court of appeals expressly recognized this principle and applied the law correctly.

CONCLUSION

Petitioner makes an impassioned plea to the Court to grant certiorari on the ground that otherwise helmet manufacturers will act callously toward children. This vitriolic attack, wholly unsubstantiated by the record, misses the mark regarding this Court's function.

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[8]In *Leonard*, the court specifically found that an allegation of "defectiveness" standing alone in a complaint fairly raised the issues of warning and design defect. 765 F.2d at 568.

The petition fails to suggest any valid reason why this Court should exercise its discretion to grant the writ. The due process claim of petitioner is without merit as petitioner was afforded a full and fair trial and was treated accordingly in the court of appeals. The court of appeals correctly applied the substantive law of Kentucky to the facts of this case.

For these reasons, respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

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